IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE R.BASANT

WEDNESDAY, THE 14TH FEBRUARY 2007 / 25TH MAGHA 1928

WP(C).No. 34540 of 2006(J)

CC.413/1997 of J.M.F.C.-I MUVATUPUZHA

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PETITIONER:

SABU GEORGE, S/O.GEORGE, AGED 42 YEARS,
GRACE VILLA, THOTTAKKARA KARA,
MEMADANGU P.O., ARAKKUZHA VILLAGE,
MUVATTUPUZHA.

BY ADV. SRI.SABU THOZHUPPADAN

RESPONDENTS:

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1. THE HOME SECRETARY,
DEPARTMENT OF HOME AFFAIRS,
UNION OF INDIA,
NEW DELHI.

2. P.K.RAVI, PUTHENPURAKKAL HOUSE,
PERINGAZHA, MUVATTUPUZHA.

R1 BY ADV. SRI.BOBY JOHN, CGC
R2 BY ADV. SRI.BABU KARUKAPADATH

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 14/02/2007, ALONG WITH CRL.M.A.8626/06 IN CRRP NO. 7 OF 2004 CRMC NO. 259 OF 2007 THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

R. BASANT, J.

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W.P.C. No. 34540 of 2006,
Crl.M.A.No. 8626 of 2006 in
Crl.R.P.No. 7 of 2004 &
Crl.M.C. No. 259 of 2007

- -

Dated this the 14th day of February, 2007

JUDGMENT

Can composition of an offence under Section 138 of the N.I. Act even after the conviction and sentence have become final after the judgments of the trial, appellate and revisional courts be accepted?

(ii) If so, which court is to accept the same? Has the trial court, appellate court or the revisional court powers to accept such composition?

(iii) If no such court can accept such composition, can this court invoke its Constitutional powers under Article 226 of the Constitution or the original extraordinary inherent power under Section 482 Cr.P.C. to accept the composition and relieve the accused of the obligation to undergo the sentence of imprisonment?

2. These questions of importance arise for consideration in these petitions. As the questions raised were reckoned by me as

important and vital, I had sought the assistance, which I get in good measure too, of Shri.S.Sreekumar, Standing Counsel for the C.B.I. and Shri.T.G. Rajendran, Advocate. All counsel have been heard in detail.

3. To the vital facts first. Crl.M.C. 259 of 2007 and Crl.M.A. 8626 of 2006 in Crl.R.P.No. 7 of 2004 are both filed by some accused in a prosecution under Section 138 of the N.I. Act. The verdict of guilty, conviction and sentence on him have become final and the said petitioner now faces a sentence of S.I. for a period of six months and to pay a fine of Rs.1,60,000/- and in default to undergo S.I. for a period of four months. If the fine is realised, an amount of Rs.1,58,000/- has been directed to be paid to the complainant as compensation under Section 357(1) Cr.P.C. Crl.M.A. 8626 of 2006 was filed initially by the petitioner with a prayer that the joint application for composition filed by the petitioner/accused and the respondent/complainant duly counter signed by their respective counsel may be accepted. It was later, by way of abundant caution, that Crl.M.C. 259 of 2007 was also filed by the petitioner/accused with a prayer that the sentence imposed on him may not be enforced in view of the subsequent composition, by invoking the powers under Section 482 Cr.P.C.

4. Writ Petition No.34540 of 2006 is filed by the petitioner therein, who is also an accused in a prosecution under Section 138 of the N.I. Act. He has also been found guilty, convicted and sentenced in a prosecution under Section 138 of the N.I. Act. He faces the sentence of S.I. for a period of one month and to pay a fine of Rs.5,000/- and in default of payment of fine, to suffer S.I. for another period of 15 days. Out of the fine amount, if realised, an amount of Rs.3,000/- has been directed to be paid as compensation to the complainant under Section 357(1) Cr.P.C.

5. The respondents/complainants are represented before me by their counsel. I am satisfied beyond the semblance of doubt, from the submissions made at the Bar as also from the joint statement reporting composition duly filed by the rival contestants and counter signed by their counsel, that the matter has been amicably settled between the parties. Thus the composition, I am satisfied, if legally permissible, can be accepted.

6. The law relating to composition of offences is essentially available under Section 320 Cr.P.C. I extract the same below:

> "**S. 320. Compounding of offences.** - (1) The offences punishable under the sections of the indian Penal Code (45 of 1860) specified in the first two columns of the Table next

following may be compounded by the persons mentioned in the third column of that Table:-

xx xxx xxx
(Table)

(2) The offences punishable under the sections of the Indian Penal Code (45 of 1860), specified in the first two columns of the Table next following may, with the permission of the Court before which any prosecution for such offence is pending, be compounded by the persons mentioned in the third column of that Table:-

(Table)

(3) When any offence is compoundable under this section, the abetment of such offence or an attempt to commit such offence (when such attempt is itself an offence) may be compounded in like manner.

(4)(a) When the person who would otherwise be competent to compound an offence under this section is under the age of eighteen years or is an idiot or a lunatic, any person competent to contract on his behalf may, with the permission of the Court, compound such offence.

(b) When the person who would otherwise be competent to compound an offence under this section is dead, the legal representative, as defined in the Code of Civil Procedure, 1908 (5 of 1908) of such person may, with the consent of the Court, compound such offence.

(5) When the accused has been committed for trial or when he has been convicted and an appeal is pending, no composition for the offence shall be allowed without the leave of the court to which he is committed, or, as the case may be,

before which the appeal is to be heard.

(6) A High Court or Court of Session acting in the exercise of its powers of revision under section 401 may allow any person to compound any offence which such person is competent to compound under this section.

(7) No offence shall be compounded if the accused is, by reason of a previous conviction, liable either to enhanced punishment or to a punishment of a different kind for such offence.

(8) The composition of an offence under this section shall have the effect of an acquittal of the accused with whom the offence has been compounded.

(9) No offence shall be compounded except as provided by this section."

The language of Section 320 Cr.P.C. indicates that the said section will apply only to offences punishable under the Indian Penal Code and not to any offence punishable under any special law.

7. Section 320 Cr.P.C. does not, hence apply specifically to Section 138 of the N.I. Act. All crimes are offences against the State and unless the law declares the offences to be compoundable, they cannot be permitted to be compounded. Such offences against the State cannot be compounded by the aggrieved private individual unless the law declares such offences to be compoundable. Realising this difficulty, Section 147 was brought into

the N.I. Act by the subsequent amendment in 2002 and the newly introduced Section 147, which I extract below, declares that the offence under Section 138 of the N.I. Act shall be compoundable.

> "**S. 147. Offences to be compoundable. -** Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), every offence punishable under this Act shall be compoundable."
>
> (emphasis supplied)

8. The first contention that is raised is that Section 320 Cr.P.C. cannot apply at all to an offence under Section 138 of the N.I. Act because Section 147 opens with the words "Notwithstanding anything contained in the Code of Criminal Procedure, 1973". But, according to me, it would be irrational and unreasonable to so understand the non-obstante clause in Section 147, because if such interpretation were accepted, there will be no other stipulated procedure under which the composition of the offence under Section 138 of the N.I. Act as permitted under Section 147 can be implemented. The non-obstante clause in Section 147 must hence be read reasonably as to mean that the offence under Section 138 will be compoundable under Section 320 Cr.P.C., notwithstanding the fact that Section 320 Cr.P.C. does not in terms apply to Section 138 of the N.I. Act

and applies only to offences under the Indian Penal Code specified under Section 320(1) and (2).

9. When composition can be legally accepted, it is necessary that there must be a procedure prescribed. The stipulation for deemed acquittal after composition must also be there, as otherwise it will be impossible to work out the consequences of a composition. In this context Sections 4 and 5 of the Cr.P.C. assume relevance. I extract them below:

> "**S.4. Trial of offences under the Indian Penal Code and other laws.-** (1) All offences under the Indian Penal Code (45 OF 1860) shall be investigated, inquired into, tried and otherwise dealt with according to the provisions hereinafter contained.
>
> (2) All offences under any other law shall be investigated, inquired into, tried and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences.
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> 5. **Saving**. - Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force."

10. When no special procedure is prescribed under any special law, the procedure prescribed under the Cr.P.C. has to be followed for investigation, enquiry, trial or otherwise dealing with such situations. If there is a specific provision contra in any such special law the provisions of the Code shall not apply. About the procedure for composition and its consequences we have stipulations in the Code. There is no provision in the N.I. Act also. Therefore, Section 4 of the Cr.P.C. must apply and Section 5 cannot apply while considering the procedure to be followed for effecting a composition of the offence under Section 138 of the N.I. Act as permitted under Section 147 of the N.I. Act. Any different understanding of the non-obstante clause in Section 147 will leave the courts without any known or specified procedure to be followed while considering the acceptance of the composition. The non-obstante clause in Section 147 means only this i.e.

> "an offence under Section 138 of the N.I. Act may not be compoundable under Section 320 of the Code. That provision as it stands may apply only to specified offences under the I.P.C. But it is stipulated hereby that the offence under Section 138 shall also be reckoned as a compoundable offence under the Code i.e. under Section 320 Cr.P.C.

I respectfully disagree with the different view taken by the Gujarat High

Court in **Kirpalsingh Pratapsingh Ori** v. **Balvinder Kaur Hardipsingh Lobana** (2004 Crl.L.J. 3786).

11. In as much as Section 147 only declares the offence to be compoundable, it will necessarily have to be assumed that the composition will fall under Section 320(1) Cr.P.C. and not under Section 320(2) Cr.P.C. Composition can be effected even without the permission of the court. That is the only way to understand Section 147 from the plain language employed by Section 147 of the Act. I, therefore, come to the conclusion that Section 147 of the N.I. Act and Section 320 Cr.P.C. read along with Sections 4 and 5 Cr.P.C. can lead only to the conclusion that the offence under Section 138 is compoundable without the permission of the Court and in the event of such composition, the procedure under Section 320 Cr.P.C. has got to be followed.

12. That takes me to the next question as to when the composition of an offence, to which Section 320(1) Cr.P.C. applies, can be effected. After the offence is committed, there must be a gap of time between such commission of the offence and cognizance of the offence by the Court. After cognizance, till the trial court pronounces the judgment, there is a gap of time. Thereafter, during the pendency of the appeal and revision also

there must be gaps of time. After the conviction and sentence become final the last stage arises and that may be prior to execution of the sentence or during execution of sentence.

13. The contention that an offence can be compounded under Section 320(1) Cr.P.C. only when the matter is pending before a court has been considered by me. But that does not appear to me to be the correct law. The decisions in **Mrs. F.M. Torpey** v. **King Emperor** (AIR 1927 Allahabad 375) and **Kumaraswami Chetty** v. **Kuppuswami Chetty** (1918) 41 Mad 685) clearly show that initiation of proceedings/prosecution is not a condition precedent for composition of the offence. In short, composition can be effected even prior to commencement of prosecution. In **Mrs. Torpey** (supra) the question is dealt with by the learned Judge in the following words, after referring to the decision in **Kumaraswami Chetty (**supra**).**

> "The lower appellate Court refused to accept the compromise on the ground that the complaint was filed subsequent to the alleged compromise and not prior thereto. An offence under S.341 may be compounded without the permission of the Court under S.345(1) of the Code of Criminal Procedure. It, therefore, does not seem to be necessary that a composition should be arrived at after a

> complaint has been filed in Court. The words of the section are:
>
> > The offence punishable under the sections of the Indian Penal Code specified in the first column of the table next following may be compounded by the persons mentioned in the third column of that table.
> >
> > An offence of wrongful restraint is compoundable by the person restrained. This appears to be the view suggested by the working of the section and is supported by a Bench ruling of the Madras High Court in the case of **Kumaraswami Chetty** v. **Kuppuswami Chetty**. The learned Judges there observed:
> >
> > > An offence is complete when the acts constituting it have been committed apart from whether any complaint or charge has been laid before the Court or not. The allusion to the "accused" in paragraph 6 of S.345 only describes his character at the time of the trial when the question of the effect of the composition is under consideration.
> > >
> > > I hold that there can be a composition of the present offence prior to a complaint."

I do completely concur with that view. That view does appear to me to be most reasonable. If a different view were taken, pending investigation into a compoundable (320(1) Cr.P.C.) offence which is cognizable and non-bailable, the accused will be forced to endure the trauma of arrest and all the paraphernalia of investigation, till a final report is filed in court, whereupon only he will be able to come to Court and seek composition. If the offence

is compoundable under Section 320(1) and the parties have compounded the offence, the police must be bound to accept the same and drop further action and make report of the same to the Magistrate concerned. If the police do not, it must be possible for the parties to approach the learned Magistrate or this Court under Section 482 Cr.P.C. I therefore agree that composition of an offence under Section 320(1) can be effected even before cognizance of the offence is taken by the Magistrate.

14. Composition pending trial, appeal and revision is perfectly possible and the language of Section 320(5) and (6) Cr.P.C. make the position crystal clear. The obvious purpose and the rationale underlying Section 320(5) and (6), it appears to me, is only that during the pendency of the proceedings composition of even an offence under Section 320(1) should not be arrived at without the knowledge of the Court before which such proceedings are pending. Section 320(5) and (6) are applicable to an offence falling within the sweep of Section 320(1) also and the purpose can only be to apprise the court of such composition. There is nothing in Section 320, which makes a post-revision composition impermissible if the offence would fall within Section 320(1) Cr.P.C. Section 320(5) and (6) speak of the event of conviction **and** pendency of an appeal or revision

and they do not deal with the liberty or option of the parties to compound the offence after trial/appeal/revision. By the same reasons given in **Mrs. Torpey,** it must hence be possible for the parties to enter into a composition even after the verdict of guilty, conviction and sentence have become final and no proceedings are pending before any Court. Going by the plain language of Section 320(1), no time limit appears to have been fixed before which the composition must necessarily take place, though for composition during the pendency of appellate or revisional proceedings leave of the Court must be sought under Section 320(5) and 320(6).

15. But then, such a conclusion also creates further problems. If the verdict of guilty, conviction and sentence have become final, which Court would accept the same so as to avoid execution of the sentence, which has become final. If the trial/appeal/revision is already over, such original, trial and revisional court would become functus officio and they will not have jurisdiction to alter their verdicts and to convert the verdict of guilty and conviction to a deemed acquittal under Section 320(8). The language of Section 362 Cr.P.C. which I extract below, makes the position clear.

> **S.362. Court not to alter judgment**. - Save as otherwise provided by this Code or by any other law for the

> time being in force, no Court, when it has signed its judgment or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error."

Therefore the judgment, which has already been rendered, cannot be altered by the trial court, appellate court or the revisional court. The decision in **State of Kerala** v. **M.M. Manikantan Nair** (AIR 2001 SC 2145) is clear authority for the proposition that a Court, which has become functus officio, cannot thereafter pass any orders in such a case. I extract para 7 of the said judgment for this proposition:

> " This Court in Hari Singh Mann v. Harbhajan Singh Bajwa, (2001) 1 SCC 169: (2000 AIR SCW 3848: AIR 2001 SC 43: 2001 Cri.LJ 128), held that Section 362 of the Criminal Procedure Code mandates that no Court, when it has signed its judgment or final order disposing of a case shall alter or review the same except to correct a clerical or an arithmetical error and that this section is based on an acknowledged principle of law that once a matter is finally disposed of by a Court, the said Court in the absence of a specific statutory provision becomes functus officio and disentitled to entertain a fresh prayer for the same relief unless the former order of final disposal is set aside by the Court of competent jurisdiction."
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> (emphasis supplied)

Therefore, it is evident that a trial, appellate or revisional Court, which has become functus officio cannot accept a subsequent composition and alter its own earlier judgment and convert the same to a deemed acquittal under

Section 320(8) Cr.P.C. It is unnecessary to refer to other precedents. Binding precedents of the Supreme Court make it clear that a Court - Original, appellate or revisional, which has finally disposed of the matter cannot thereafter exercise any such powers which it could have invoked and exercised prior to such final disposal.

16. If the trial, appellate and revisional court cannot do the same and the composition is legally permissible, the question necessarily will have to be considered as to which court can and in what manner the accused, the offence against whom has been compounded in accordance with law, can be saved from the trauma of suffering the sentence.

17. It is here that the next question arises as to whether powers under Section 482 Cr.P.C. can be invoked by this Court to give effect to such a composition which has been legally arrived at, but for the acceptance of which, there is no specific stipulation of law. Section 482 Cr.P.C. reads as follows:-

> "**S. 482. Saving of inherent powers of High Court. -** Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice."

18. Precedents galore to indicate the sweep, width and amplitude of the inherent powers of this Court under Section 482 Cr.P.C. Section 482 does not really confer any power on the High Court exercising criminal jurisdiction. It only saves the inherent powers of the High Court, which was always there. Ex debito justitiae such powers can be invoked and such powers were always available with the court. The width and amplitude of such powers must necessarily instill in the mind of the Court the need to be circumspect. But such powers are not fettered by any stipulations of the Code. If there be any doubt on this proposition, it will be apposite to refer to the decision in **Raj Kapoor** v. **State** (1980) 1 SCC 43). Justice Krishna Iyer in paragraph 10 of that decision refers to the powers under Section 482 Cr.P.C. in the following words:

> "10. The first question is as to whether the inherent power of the High Court under Section 482 stand repelled when the revisional power under Section 397 overlaps. The opening words of Section 482 contradict this contention because nothing of the Code, not even Section 397, can affect the amplitude of the inherent power preserved in so many terms by the language of Section 482. Even so, a general principle pervades this branch of law when a specific provision is made: easy resort to inherent power is not right except under compelling circumstances. Not that there is absence of jurisdiction but that inherent power should not invade areas set apart for specific power under the same Code."
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> (emphasis supplied)

19. Later, the Supreme Court had occasion to specifically consider whether the stipulations under Section 320 Cr.P.C. would fetter the powers of the High Court under Section 482 Cr.P.C. The decision in **B.S. Joshi** v. **State of Haryana** (AIR 2003 SC 1386) makes the position clear and the Supreme Court speaks thus through Justice Y.K. Sabharwal in paragraphs 8 and 15:

> "8. It is, thus, clear that Madhu Limaye's case does not lay down any general proposition limiting power of quashing the criminal proceedings or FIR or complaint as vested in S.482 of the code or extraordinary power under Art.226 of the Constitution of India. We are, therefore, of the view that if for the purpose of securing the ends of justice, quashing of FIR becomes necessary, S.320 would not be a bar to the exercise of power of quashing, it is however, a different matter depending upon the facts and circumstances of each case whether to exercise or not such a power."
>
> "15. In view of the above discussion, we hold that in the High Court in exercise of its inherent powers can quash criminal proceedings or FIR or complaint and S.320 of the Code does not limit or affect the powers under S. 482 of the Code."
>
> (emphasis supplied)

These observations were made while considering the question of quashing an F.I.R. But there is nothing to show that the principle will not apply when the question of quashing a sentence which has become final is considered when the offence is legally compounded.

20. A Full Bench of this Court had looked at the sweep of the powers under Section 482 Cr.P.C., though in a different context, and the rationale underlying in Section 482 Cr.P.C. is expressed by the Full Bench in the following words in **Moosa** v. **Sub Inspector of Police** (2006 (1) KLT 552):

> "No legislative enactment dealing with procedure can provide for all cases that may possibly arise. Courts, therefore, have inherent powers apart from express provisions of law which are necessary for proper discharge of functions and duties imposed upon them by law. In exercise of the powers court would be justified to quash any proceedings if it finds that initiation or continuance of it amounts to abuse of the process of court or quashing of these proceedings would otherwise serve the ends of justice."
>
> (emphasis supplied)

21. Having so understood the sweep of the powers under Section 482 Cr.P.C., I need only mention that the powers under Article 226/227 of the Constitution are coextensive if not wider in its sweep. The powers under Section 482 Cr.P.C. as also Article 226 and 227 of the Constitution are available with the Court to do justice in a given case when the conscience of the Court is satisfied that powers must be invoked.

22. It will be apposite to straight away look at Section 320 Cr.P.C. again. Section 320 does not specifically refer to composition prior to the

commencement of the prosecution or of composition after the sentence has become final. Section 320, which must be reckoned as consolidating the law relating to composition, does not specifically refer to pre-cognizance and post-finality (of conviction) compositions. Section 320(9) Cr.P.C. only says that there shall be no composition except in accordance with the provisions of Section 320 Cr.P.C. In as much as Section 320 does not specifically refer to compositions - pre-cognizance or post-finality, and Section 320(1) only speaks of composition without any fetters or limitations about time and stage, section 320(9) cannot be held to fetter the powers in such situations.

23. The rationale underlying Section 482 Cr.P.C. is that the interests of justice may at times transcend the interests of mere law. In the peculiar facts and circumstances of a given case when the High Court considers it necessary, proper and fit and feels impelled and compelled to act in aid of justice, it should not be without powers and helpless. While appreciating the width and amplitude of the powers under Section 482 Cr.P.C. this principle cannot be lost sight of. Of course if there is a specific express bar or if the stipulations point to an implied bar, such powers cannot normally be invoked.

24. We now come to the crucial question as to whether this court, having already disposed of the revisions, can invoke the powers under Section 482 Cr.P.C. The revision has been disposed of and the verdict of guilty, conviction and sentence have now become final. I have come across decisions which stipulate that in view of Section 362, even this Court exercising original power as a criminal court under Section 482 Cr.P.C., cannot go against the mandate of Section 362. The decision in **Smt. Sooraj Devi** v. **Pyare Lal & anr.** (1981) 1 SCC 500) clearly holds that after the judgment is pronounced, on the same facts powers under Section 482 Cr.P.C. cannot be invoked in view of the specific bar under Section 362. This position has been held repeatedly. In **Hari Singh Mann** v. **Harbhajan Singh Bajwa** (AIR 2001 SC 43), it was held by the Supreme Court as follows in paragraphs 8 and 9:

> "8. xxx xxx
>
> The practice of filing miscellaneous petitions after the disposal of the main case and issuance of fresh directions in such miscellaneous petitions by the High Court are unwarranted, not referable to any statutory provision and in substance the abuse of the process of the Court.
>
> 9. There is no provision in the Code of Criminal Procedure authorising the High Court to review the judgment

> passed either in exercise of its appellate or revisional or original criminal jurisdiction. Such power cannot be exercised with the aid or under the cloak of Section 482 of the Code."

In **State of Kerala** v. **M.M. Manikantan Nair** (AIR 2001 SC 2145) the Supreme Court held so in paragraph 6:

> "6. The Code of Criminal Procedure does not authorise the High Court to review its judgment or order passed either in exercise of its appellate, revisional or original jurisdiction. Section 362 of the Code prohibits the Court after it has signed its judgment or final order disposing a case from altering or reviewing the said judgment or order except to correct a clerical or arithmetical error. This prohibition is complete and no criminal Court can review its own judgment or order after it is signed."

In **Moti Lal** v. **State of Madhya Pradesh** (AIR 1994 SC 1544) the Supreme Court held so in paragraph 2:

> "2. Section 362 Cr.P.C. in clear terms lays down that the Court cannot alter judgment after the same has been signed except to correct clerical or arithmetical errors. That being the position the High Court had no jurisdiction under Section 482 Cr.P.C. to alter the earlier judgment."

In **Damodaran v. State** (1992 (2) KLT 165) and in **Tanveer Aquil** v. **State of Madhya Pradesh** (1990 Suppl. SCC 63) we find observations which suggest that a post revision composition cannot be readily accepted. Those decisions, according to me, only reiterate the principle that a trial, appellate or revisional court which is functus officio in respect of a subject

matter cannot thereafter exercise powers in respect of such disposed of matters in view of Section 362 Cr.P.C.

25. But these decisions cannot be held to cover a situation when post-revision there has been a substantial change in the circumstances and a later request is made in a separate application under Section 482 Cr.P.C. or Article 226 of 227 of the Constitution. That question was specifically considered by the Supreme Court in **Mostt. Simrikhia** v. **Smt. Dolley Mukherjee** (1990 Crl.L.J. 1599). In paragraph 2 of the said decision, the Supreme Court has observed thus:

> "If there had been change in the circumstances of the case, it would be in order for the High Court to exercise its inherent powers in the prevailing circumstances and pass appropriate orders to secure the ends of justice or to prevent the abuse of the process of the Court. Where there is no such changed circumstances and the decision has to be arrived at on the facts that existed as on the date of the earlier order, the exercise of the power to reconsider the same materials to arrive at different conclusion is in effect a review, which is expressly barred under S.362."

26. In the instant cases, when the revision petition was disposed of by this Court, this circumstance - that the parties settled the dispute and the complainant compounded the offence - was not there at all. It is a subsequent change in circumstance. The decision in **Mostt. Simrikhia**

(supra) squarely applies. That was a case where an earlier application under Section 482 Cr.P.C. was dismissed, but still the Supreme Court held that a change in circumstances is sufficient to justify the invocation of the powers afresh under Section 482 Cr.P.C. notwithstanding the bar under Section 362 Cr.P.C. In the instant case, the powers under Section 482 Cr.P.C. have not been sought to be invoked earlier. Only the revisional powers were exercised. That is all the more the reason why under the changed circumstances the extra ordinary inherent jurisdiction under Section 482 Cr.P.C. can be invoked. In the light of the dictum in **Mostt. Simrikhia** earlier decisions rendered and subsequent decisions, which do not refer to the said decision specifically and in which the opinion is expressed that the powers under Section 482 Cr.P.C. cannot be invoked after disposal of the revision in view of the bar under Section 362, cannot be held to lay down the law correctly.

27. Lastly, the question arises whether, in the facts and circumstances of this case, such power can or need be invoked. The prosecution is under Section 138 of the N.I. Act. Basically the crux of the offence is the inability of a person to make payment of the amount due under the cheque within the stipulated period of time when demand is made

on the basis of a dishonoured cheque. Virtually culpability lies in the failure to discharge a financial liability. One cannot lose sight of the fact that essentially and basically it is the failure to pay the amount within the stipulated time even after notice of demand is received, which is made punishable under Section 138 of the N.I. Act. In such a case conscience of the court would be hurt if in spite of composition the accused were to be compelled to undergo a substantive sentence of incarceration in prison. The prison sentence is frightening for the polity. The polity abhors it. Unless absolutely necessary, such deprivation of liberty should not be resorted to. These circumstances also must weigh with the court while considering the question whether powers under Section 482 Cr.P.C. can and ought to be invoked in cases like the instant ones.

28. Having rendered my very anxious consideration to all the relevant inputs, I am satisfied that these are eminently fit instances where powers under Section 482 Cr.P.C. can and ought to be invoked in favour of the petitioners herein, who have settled their disputes with the respective complainants and have made payment of the amounts payable to the respective complainants/payees under the cheques in question. To direct the parties to go to the Supreme Court to get the composition accepted or to

knock at the door of the Government for invocation of the powers under Sections 432 or 433 to avoid incarceration in prison would be heartless and would amount to unjustified abdication of the jurisdiction under Section 482, I feel.

29. Will not such invocation of the powers militate against the majesty of law and the finality of decisions rendered? If composition can be reached at any time after the conviction and sentence have become final, what respect can decisions of the Courts command? These questions do disturb me. But in the final analysis they do not persuade me to hold differently. The offence is compoundable. Parties have settled their disputes amicably. Complainants have voluntarily compounded the offence. There is no specific bar against such composition after the finality of the conviction and sentence. The offence is only one under Section 138 of the N.I. Act. If the powers under Section 482 Cr.P.C. were not invoked by this Court, the petitioners will have to necessarily undergo the dreadful ordeal of punitive incarceration in prison. By being humane and considerate towards such an accused who has made amends and reversed his culpable conduct, the majesty of the law will not suffer at all. Quality

of mercy is the most important dimension of justice. I hold that these are fit cases to invoke the powers under Section 482 Cr.P.C.

30. I may hasten to observe that I do not intend to lay down a rule of the thumb that there can be post revision composition as a matter of routine. Facts in each case will have to be considered carefully. That the petitioners shall have to undergo punitive substantive sentence of imprisonment in prison in these cases, under Section 138 of the N.I. Act does perhaps persuade me in the final analysis to invoke such powers.

31. In both these cases, I find that an amount of Rs.2,000/- is to be paid to the State as fine and in these circumstances the powers under Section 482 Cr.P.C. can be invoked only subject to the condition that such amounts must be paid to the State by the respective petitioners. Such a stipulation shall ensure the interests of justice eminently.

32. To sum up, I take the view that in a case falling under Section 320(1) Cr.P.C. where there has been a post revision composition of the offence by the victim/complainant, the jurisdiction under Section 482 Cr.P.C. (and of course Article 226/227 of the Constitution) is in law available with the High Court and in a fit case such powers can and ought

to be invoked. The cases on hand are eminently fit cases where such jurisdiction can and ought to be invoked, I conclude.

33. In the result, W.P.(C) 34540 OF 2006 and Crl.M.C. 259 of 2007 are allowed. It is directed that the sentences imposed on the petitioners shall not be executed on condition that the petitioners deposit an amount of Rs.2,000/- each before the learned Magistrates concerned within a period of 45 days from this date. In default of payment of the said amount of Rs.2,000/- each, they shall undergo the default sentences approved in the respective orders in revision.

34. Crl.M.A.No. 8626 of 2006 in Crl.R.P.No. 7 of 2004 is dismissed as unnecessary in view of the order in Crl.M.C. 259 of 2007.

(R. BASANT)
Judge

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